

FILED

FEB 17 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFRED ARNOLD AMELINE,

Defendant-Appellant.

No. 02-30326

**MOTION TO DEFER DISPOSITION OF ALL PENDING DIRECT
CRIMINAL APPEALS PRESENTING *BOOKER* CLAIMS
PENDING RESOLUTION OF THE GOVERNMENT'S PETITION FOR
REHEARING EN BANC; TO EXPEDITE CONSIDERATION OF THE
DECISION WHETHER TO REHEAR THIS CASE EN BANC; AND, IF
THE PETITION IS GRANTED, FOR EXPEDITED ORAL ARGUMENT**

The United States of America, by and through the 14 United States Attorneys in the Ninth Circuit, respectfully requests that the Court (i) defer further disposition of all pending direct criminal appeals presenting claims under *United States v. Booker*, 125 S. Ct. 738 (2005), pending the disposition of the government's petition for rehearing en banc and the defendant's response; (ii) expedite consideration of the decision whether to rehear this case en banc; and, if the petition is granted, (iii) expedite oral argument.

To the extent that some or all of the requested relief can be granted by the three-judge panel, we request that it do so; but to the extent that the panel is either not authorized to grant any portion of our request or is otherwise disinclined to grant any portion of our request, we ask that our motion be submitted to the full court for its consideration.

1. The panel decision constitutes this Circuit's authoritative interpretation of the Supreme Court's seminal decision in *United States v. Booker*, 125 S. Ct. 738 (2005). The panel's interpretation and application of *Booker* to cases pending on direct review is generating (and will continue to generate) an unprecedented and disruptive avalanche of litigation throughout the district courts of this Circuit and in this Court itself. Indeed, we expect that, in the aftermath of this decision and in light of the ruling, this Court will begin the process of remanding hundreds, if not thousands, of cases to the district courts for resentencing. As a consequence, many defendants will receive new sentencing hearings – and potentially new sentences – to which they have no legal entitlement.

Because of the large number of cases whose disposition will be affected by the decision in this case, it is vitally important that the Court take appropriate steps to ensure the evenhanded treatment of similarly-situated defendants and minimize the risk of inequity that could otherwise result from disparate treatment. *See Griffith v.*

Kentucky, 479 U.S. 313, 323-324 (1987); *see also Booker*, 125 S. Ct. at 758 (“[W]e must apply today’s holdings * * * to all cases on direct review.”). As a result, the Court should defer further disposition of pending *Booker*-related appeals until our en banc petition is finally resolved.

We further note that this Circuit’s handling of the decision in *United States v. Buckland* – in which a three-judge panel held the enhanced penalty provisions of 21 U.S.C. 841(b) to be unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but the en banc court later reversed – supports our request for deferral. In a number of related cases, this Court appears to have deferred consideration both formally (*i.e.*, by entering memorandum dispositions expressly deferring resolution of the matter pending an en banc decision) and informally (*i.e.*, by simply holding the case is abeyance pending the en banc decision). *Cf. United States v. Pelayo-Jimenez*, 46 Fed. Appx. 447 (9th Cir. 2001) (“[W]e deferred resolution of Pelayo-Jimenez’s claim that his sentence was unconstitutional under *Apprendi v. New Jersey* pending en banc resolution of *United States v. Buckland*”) (citations omitted); *United States v. Carillo*, 45 Fed. Appx. 665, 665 n.* (9th Cir. 2002) (suggesting informal hold); *United States v. Frye*, 41 Fed. Appx. 111 (9th Cir. 2002) (noting that “[w]e resolved [defendant’s] claims unrelated to *Apprendi* in an earlier memorandum disposition, and ordered the remaining issues deferred pending resolution of *United States v.*

Buckland, which held that 21 U.S.C. § 841(a)(1) is constitutional”) (citations omitted); *see also Kogianes v. Thomas*, 79 Fed. Appx. 959, 960 (9th Cir.) (“We previously deferred submission of this case pending the resolution and disposition of the en banc case, *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir.2003) (en banc).”); *Summerlin v. Stewart*, 341 F.3d 1082, 1091 (9th Cir. 2003) (“Because this was an issue that had been raised by Summerlin in his state and federal court petitions, the panel withdrew its decision and deferred submission of the case pending the Supreme Court's resolution of [*Ring v. Arizona*].”), *rev'd sub nom. Schriro v. Summerlin*, 124 S. Ct. 2519 (2004). Inasmuch as *Booker* has even broader ramifications than *Buckland*, a similar approach is warranted here.

2. Given the exigencies of the situation, moreover, and the pressing public need for clear and definitive guidance, we respectfully request that the Court expedite consideration of our en banc petition and the defendant's response. *See* 9th Cir. R. 35-3, adv. comm. notes (describing the normal internal timeline used to consider requests for rehearing en banc). And, in the event the Court elects to rehear this case en banc, we further request that the Court schedule oral argument on an expedited basis. *Cf. Southwest Voter Registration Educ. v. Shelley*, 344 F.3d 814, 816 (9th Cir. 2003) (rehearing en banc held 7 days after issuance of panel decision).

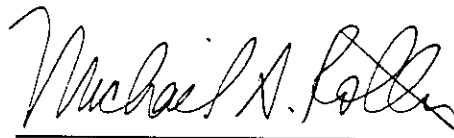
WHEREFORE, the government respectfully requests that the panel or, if necessary, the en banc court, (i) defer further disposition of all pending direct criminal appeals presenting claims under *United States v. Booker*, 125 S. Ct. 738 (2005), pending the disposition of the government's petition for rehearing en banc and the defendant's response; (ii) expedite consideration of the decision whether to rehear this case en banc; and, if the petition is granted, (iii) expedite oral argument.

Respectfully submitted,

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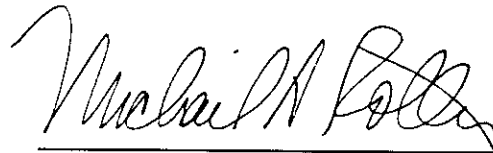
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two (2) true and correct copies of the foregoing Petition for Rehearing En Banc to be served this ^{16 MAR} 15th day of February 2005 by Federal Express overnight delivery on:

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